APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany, on the second day of December 2004.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 1031

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

A motion for reargument of motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

Mo. No. 1031
December 2, 2004

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

DECISION

Motion for reargument of motion for leave to appeal is denied.

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany, on the twenty-first day of September 2004.

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

2-10 Mo. No. 708

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

A motion for leave to appeal &c. to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ STUART M. COHEN
Stuart M. Cohen
Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

2-10 Mo. No. 708
September 21, 2004

CLARENCE HARLEY,

Appellant,

v.

ROBERT ADLER, &C., et al.,

Respondents.

DECISION

Motion for leave to appeal &c. is denied.

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION:
SECOND JUDICIAL DEPARTMENT

D3007 O/cf

_____AD3d_____ Submitted—March 29, 2004

HOWARD MILLER, J.P.
THOMAS A. ADAMS
SANDRA L. TOWNES
WILLIAM F. MASTRO, JJ.

2003-02005
(Index No. 50587/00)

CLARENCE HARLEY,

appellant,

v

ROBERT ADLER, ETC., et al.,

respondents.

Clarence Harley, New York, N.Y., appellant pro se.

McManus, Collura & Richter, P.C., New York, N.Y. (Anne Marie Forte and Peter McGowan of counsel), for respondents.

In an action, inter alia, to recover damages for fraud, the plaintiff appeals from an order of the Supreme Court, Kings County (Ruchelsman, J.), dated January 21, 2003, which granted the defendants' motion for summary judgment dismissing the complaint.

ORDERED that the order is affirmed, with costs.

The plaintiff failed to raise a triable issue of fact in response to the defendants' prima facie showing of entitlement to judgment as a matter of law that the complaint is barred by the doctrine of res judicata (*see Matter of Hodes v Axelrod*, 80 NY2d 364; *Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485). Res judicata precludes a plaintiff from re-litigating claims which could have or should have been litigated in prior proceedings (*see CRK Contr. of Suffolk v Brown & Associates*, 260 AD2d 530; *Coliseum Towers Assocs. v County of Nassau*, 217 AD2d 387).

In light of this determination, the parties' remaining contentions need not be reached.

H. MILLER, J.P., ADAMS, TOWNES and MASTRO, JJ., concur.

May 10, 2004

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: PART 16

Index No. 50587/00
January 21, 2003

CLARENCE HARLEY,

Plaintiff,

—against—

ROBERT ADLER, Individually and as a Partner of HESTERBERG & KELLER, JONATHON [*sic*] L. MATE, GREGORY X. HESTERBERG, Indivdually [*sic*] and as Partners of HESTERBERG & KELLER, and the Law Firm of HESTERBERG & KELLER,

Defendants.

PRESENT: HON. LEON RUCHELSMAN

DECISION AND ORDER

The defendant has made a motion dismissing the case on the grounds of res judicata. The plaintiff vigorously opposes the motion. After hearing the arguments of all parties this court now makes the following determination.

Background

The Plaintiff, Clarence Harley was retained by the Estate of Russell Smith who died intestate on May 24, 1984 to perform general accounting services prior to the appointment of a Public Administrator. In August 1986 the decedent's nephews, Joseph Smith and Russell S. Smith were appointed co-administrators. In August 1993 Joseph Smith brought a proceeding to remove Russell S. Smith as co-administrator. A conference was held and defendant Robert Adler was present on behalf of the Public Administrator. The court indicated it would remove both co-administrators and appoint Adler to represent the Public Administrator instead. It was revealed at that time that Adler had briefly been involved with Russell S. Smith four years earlier concerning this case when he approached Adler concerning an earlier effort on the part of Joseph Smith to remove his [*sic*] as a fiduciary. Notwithstanding this revelation neither plaintiff nor any other party objected to the appointment of Adler and his law firm's representation of the Public Administrator.

Following the appointment of Adler, both former fiduciaries submitted accountings including Harley's fee. Adler objected to the fees requested. Following that objection, Harley raised Adler's prior dealings with Russell S. Smith and the obvious alleged conflict of interest it presented to Adler and requested that Adler be disqualified. Likewise, Joseph Smith, through an attorney also sought Adler's disqualification based upon these potential conflict of interest claims. Subsequent negotiations produced a stipulation in open court followed by an order signed by Surrogate Bloom whereby Adler agreed to withdraw his objections to the fees requested and allow them to be submitted and

decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment.

Following that agreement the Surrogate ruled that Harley's requested fees of $24,693.75 were 'excessive and unjustified' and reduced the amount of fees to $1,500.

A few months after the award was finalized, Harley filed a grievance with the Grievance Committee of the Appellate Division Second Department on the grounds that Adler violated the rules prohibiting attorney's [*sic*] from engaging in conflict of interests since he had prior discussions with Russell S. Smith and that he had engaged in various frauds and improprieties. The Grievance Committee obtained statements from both Harley and Adler and on April 15, 1998 dismissed the complaint filed by Harley.

This lawsuit followed wherein Plaintiff alleges essentially that Adler committed fraud and deceit due to his prior discussions with Russell S. Smith which enabled Smith to fraudulently encumber Estate property.

Conclusions of Law

The doctrine of res judicata prevents future litigation between the same parties concerning the same cause or causes of action (*Hodes v. Axelrod*, 70 NY2d 364, 520 NYS2d 933 [1987]). Res judicata bars matters actually litigated as well as matters which could have been litigated (*Latham Sparrowbush Associates v. Shaker Estates Inc.*, 153 AD2d 788, 545 NYS2d 219 [3rd Dept., 1989]). The doctrine of res judicata bars all future claims arising out of the same transaction even if based on different theories or if seeking different remedies (*Brooklyn Welding Corp. v. City of New York*, 198 AD2d 189, 604 NYS2d 87 [1st Dept., 1993]).

In this case all the claims being asserted against Adler and the remaining defendants have already been addressed and rendered final by prior Surrogate Court decisions. While the Surrogate decision awarding Plaintiff his fees makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order. In fact the only reason such allegations were not more fully explored was because Plaintiff specifically waived those claims in open court pursuant to an agreed upon Stipulation with Adler (*see*, *Bailey v. New York City Transit Authority*, 196 AD2d 854, 602 NYS2d 177 [2d Dept., 1993]). Although not required the stipulation was endorsed by the Surrogate's Court in a written order (*Babiarz v. Gasparini*, 198 AD2d 608, 603 NYS2d 915 [3rd Dept., 1993]). The plaintiff has introduced no evidence demonstrating fraud or deceit in the entering of that stipulation itself except to cursorily declare it mere 'conjecture' and 'fraud' (*Dkystra v. Dkystra*, 211 AD2d 745, 621 NYS2d 693 [2d Dept., 1995]). However, a review of the minutes of the conference held January 19, 1995 reveals otherwise. The record reflects that Adler notified the court of a stipulation reached concerning action about his alleged improprieties which was recited in open court in great detail. Plaintiff never objected to the stipulation and failed to join Russell S. Smith who made similar accusations against Adler later during the conference. Without some objective evidence tending to show fraud or deceit or other improper behavior on the part of Adler the court is bound to accept the stipulation.

Nor is the stipulation unduly vague as to raise factual issues taking the matter outside the scope of res judicata. In *Dunleavy v. First American Title Insurance*, 117 AD2d 952, 499 NYS2d 264 [3rd Dept., 1986]), the court held that

the stipulation there was so vague and the parties were in complete disagreement as to its meaning and intent that it could not be said with any definitiveness whether the present action concerned the same issues as the prior one. The court noted the ambiguities raised issues of fact and law which precluded dismissing the action on res judicata grounds. However, no such ambiguity exists, in fact Plaintiff concedes the contents of the stipulation but insists it was the product of fraud. Plaintiff cannot substantiate those claims, on the contrary, his conduct at the hearing demonstrated he acquiesced to the stipulation. Therefore, all the claims sought here were already decided and rendered final by prior judgements of the surrogate's [*sic*] court. Thus, all of the claims raised here are barred by res judicata.

Based on the foregoing, the motion of the defendant is granted and the case is dismissed.

So ordered.

ENTER

DATED: January 21, 2003
Brooklyn N.Y.

/s/ LEON RUCHELSMAN
Hon. Leon Ruchelsman
JSC

APPENDIX E

EXCERPT OF NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS, STATE OF NEW YORK

22NYCRR § 500.11(d)(1)(ii) Questions Presented for Review

Whether a party may commence a suit challenging a stipulation for reasons that would invalidate a contract where the action has terminated?

Whether the Appellate Division failure to find that the lower court, in exercising discretion, failed to accord the appellant consideration entitled on the complaint on appeal?

Whether an attorney, who has caused a court to make an erroneous adjudication of an issue, that the court has made that adjudication, absolves the attorney of any misconduct, accountability and responsibility?

Whether material misrepresentations made by an attorney triggers the statutory provisions of Judiciary Law § 487?

22NYCRR § 500.11(d)(1)(iii) Procedural History

Timeliness Chain

On June 8, 2004, Plaintiff-Appellant served, by mail, the Appellate Division, Second Department's May 10, 2004 decision/order (Exhibit A) on the Defendant-Respondents.

Procedural History

The appellant commenced this action in [*sic*] December 29, 2000 by service of a Summons with Notice. Issue was thereafter joined. By court order of the Supreme Court the appellant was required to file the Note of Issue by October 31, 2002. Subsequent to filing the note of issue the respondents moved for summary judgment motion. During the pendancy of that motion the respondents moved the court to vacate the Note of Issue.

The motion to vacate the Note of Issue was granted during the pendancy of summary judgment by Justice Rivera while the summary judgment motion was heard by Justice Rushelsman. The appellant filed an Appeal and the Appellate Division affirmed the lower court's decision. Dismissing the complaint on the grounds of res judicata.

22NYCRR § 500.11(d)(1)(iv)
Jurisdiction

The Court has jurisdiction, pursuant to CPLR §5602(a)(1)(i), in a proceeding originating in the Supreme Court from an order/decision of the Appellate Division which finally determines the proceeding and which is not appealable as of right.

22NYCRR § 500.11(d)(v)
Why the Questions Presented Merits Review

This case merits review since affirmation by the 2nd Department involves conflict with prior decisions of this Court. This case presents a situation wherein the 2nd Department affirmed the lower court's decision concluding the appellant failed to raise a triable issue of fact in response to the defendants' prima facie showing of entitle-

ment to judgment as a matter of law the complaint is barred by the doctrine of res judicata.

The affirmance applied the doctrine of res judicata where issues were never raised in a prior action and/or the prior action was never adjudicated on the merits. In another aspect the application was inappropriate and/or exceptions to the application were present. Moreover, in applying the principle the lower court failed to take into account evidence and/or afford the appellant some factor entitled to consideration. The case presents novel issues where an attorney is liable to a third party during a court proceeding.

The appellant was engaged by co-fiduciaries Joseph Smith and Russell S. Smith by contract to provide necessary accounting services for the disposition of the estate of their deceased uncle Russell Smith. During the administration one co-fiduciary Russell S. Smith engaged in misconduct encumbering estate assets without the knowledge of the other. The co-fiduciaries were ultimately removed and Samuel Plotkin, Public Administrator, Kings County, was installed in 1993 and the respondents were appointed as legal counsel on about January 27, 1994. The Public Administrator had been advised on several occasions that respondent Robert Adler had appeared in the same referenced estate representing for Russell S. Smith. The Public Administrator failed to move on the knowledge of the potential conflict. Thereafter, the respondents, on behalf of the administrator, commenced to systematically obscure and/or illegal acts and other misconduct of his former client. After several administrative sessions where Joseph Smith refused to consent to a novation permitting the estate to pay personal debts of Russell S. Smith, respondent Robert Adler declared that he, on behalf of the public

administrator, would pay over $72,000 of loans entered into by Russell S. Smith where he failed to disclose his fiduciary capacity. The appellant dispensed an SCPA § 719(10) notification dated July 21, 1994 bringing to the attention of the court mismanagement and misapplication of estate assets.

Through his attorney the appellant filed a formal petition application on or about November 24, 1994 seeking the removal of Samuel Plotkin, Public Administrator, after the court failed to move on the initial SCPA § 719(10) notification. On November 30, 1994, the appellant along with his attorney, Valerie Hawkins, attended a pre-discovery meeting related to a contested accounting proceeding commenced by the Public Administrator. Respondent Robert Adler, Gary Mund, court attorney, and counsel for prior co-fiduciary Russell S. Smith were in attendance. Respondent Robert Adler submitted an offer for the appellant to withdraw his application to revoke the public administrator in return the public administrator would not oppose and/or withdraw objections to the appellant's application to validate his fees. The appellant had no incentive to bargain with the respondent since his contract obligations with the estate were supported and documented with an affidavit of service already filed with the court; therefore, the circumstances were not quid pro quo. The appellant declined and instructed his attorney by letter dated December 2, 1994 accordingly [App 35a-36a]. However, the participating attorneys having other objectives and purposes and having the will, means and the wherewithal, engaged in collusion to defraud the appellant of his pending rights in the court. The appellant was ultimately damaged. The instant complaint on appeal was commenced December 29, 2000, pursuant to CPLR 213(8) and Judiciary Law § 487.

In its primary aspect the doctrine of res judicata operates as a bar to the maintenance of a second suit between the same parties on the same cause of action. The elements of res judicata are:

(1) the identical issue is under consideration

(2) a final judgment was reached on the merits in the earlier adjudication;

(3) the part against whom that judgment is now asserted was a party or in privity with a party in the prior action

The relief sought in the prior action was the removal or suspension of Samuel Plotkin, Public Administrator. The issues raised and/or facts to be proved were whether the *Public Administrator, through his attorneys, was engaged in conduct adverse to the interest of the estate* namely, but not limited to, treating over $72,000 of loans entered into by Russell S. Smith, as priority liabilities of the estate, where he failed to disclose his representative capacity as fiduciary and failed to disclose the estate; improperly obscuring and/or concealing improper and illegal acts committed by the same co-fiduciary, in light of, Surrogate's decree that Russell S. Smith was ineligible to act as a fiduciary at the time of his appointment (Exhibit C–Decree); failing to determine whether Russell S. Smith improperly masqueraded as the decedent encumbering estate assets, failing to defend the estate against improper creditors, and; finally failing to remove the respondents as legal counsel once it was affirmatively shown that they represented Russell S. Smith in a prior action in the same referenced estate. The appropriate rules and laws applicable were namely, but not limited to, SCPA 711, ETPL [*sic*]

11-4.7(a) and procedural and customary rules of New York regarding attorney disqualification (*Seely v Seely 129 A.D.2d 625, 514 N.Y.S.2d 110*). Respondent Robert Adler summarizes the relevant issues in the prior action to remove the public administrator in his position statement dated September 4, 1997 provided to the grievance committee prior to the commencement of this lawsuit at item App 50a; item App 54a #22 at pages 4-5 and Part II at App 59a.

The relief sought in the current case is pecuniary remuneration for damages caused by the false inducement and/or false representation. The issues to be raised and/or facts to be proved are whether there was a bona fide agreement with pertinent parties; whether the appellant's attorney, the respondents and/or other parties agreed, by word or deed, to defraud the appellant. The relevant law and/or statutory rules applicable on appeal are CPLR 213(8) and Judiciary Law § 487. Judiciary Law § 487 provides that an attorney who is guilty of *any* (emphasis added) deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

Accordingly, the differences which exist between the issues raised in the prior action and those raised now, namely, the differences in the kind of relief, the kind of facts to be proved, and the kind of law to be applied, outweigh the similarities such that the doctrine of res judicata is inapplicable (*Coliseum Towers Assoc. v County of Nassau, 217 AD2d 387*).

Instant Action Contesting Stipulation not Barred

The essence of the complaint on appeal is whether the appellant can contest a purported stipulation raised by the respondents reduced to order dismissing an action to revoke the letters of administration issued to the Public Administrator in a prior court action (Exhibit C). The appellant's allegation that the stipulation was the product of fraud and collusion engaged in by the participating attorneys and was not an issue considered by the Surrogate. While the respondents, as the moving party for summary judgment, totally evade the issue claiming that the allegations of professional misconduct of fraud, deceit and collusion revolved around the respondent Robert Adler's purported conflict of interest due his prior dealings with Russell S. Smith and that any claim for of fraud, deceit and collusion should have been raised in the Surrogate's Court action and were raised in those proceedings. As outlined above the instant complaint on appeal is about the respondents falsely inducing appellant and falsely representing to the appellant and/or the Surrogate that an agreement was entered into withdrawing the application to revoke the Public Administrator. As a matter of fact, the lower court correctly found that allegations in the complaint were not before the court but immediately reversed itself, indicating, ". . . the Surrogate decision awarding Plaintiff fees makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order. Nonetheless, the germane issue is whether the appellant may institute a new action contesting the stipulation on the record. The Court of Appeals held in Yonkers Fur Dressing Co v Royal Ins. Co[1] that an agreement:

[1] 247 N.Y. at 444, 160 N.E. at 781

> "that the above entitled litigation is settled and terminated . . . is not a mere arrangement between counsel made during the pendency of the case from which a party might be relieved when both parties could be restored substantially to their former position in court and when it would be inequitable to hold the parties to it . . . The compromise was wholly foreign and extrinsic to the litigation and to any action by the court."

The settlement, the Court continued, created a new liability; it could be upset in an independent suit for reason that would undo a contract, such as fraud and over-reaching but not in the discretion of the court by motion once the suit was settled. Accordingly, the instant appeal raising allegations of fraud collusion and/or deceit is not barred by res judicata. Accordingly, where the record reflects that the appellant was negligently represented by his attorney, namely but not limited to, allowing the respondents to use her letter dated December 5, 1994 to falsely induce the appellant into thinking that his application was withdrawn [App 45a], coupled with the her failure to attend the hearing and misdirecting her misconduct by fax dated January 17, 1994 and; thereafter, by letter dated December 5, 1997 affirming that she did not enter into an agreement and/or proof that she engaged in collusion with the respondents [App 38a], constitute reasons that would invalidate a contract is a triable issue of fact; or the respondents falsely representing to the Surrogate that an agreement was entered into with appellant's attorney and/or 'unspecified' parties withdrawing petition application to revoke the Public Administrator when that was untrue, constitute reasons that would invalidate a contract; or the respondent claim-

ing during the hearing "Mr. Harley absolutely, your Honor, has no right, not only to make that statement, but Mr. Harley has no interest in this proceeding. He is proceeding improperly, he has a claim. . ." constitute overreaching and; the appellant, as an interested party, entitled to file his application, fined a sum of $10, 000 [*sic*] by the Surrogate for raising his issues in his petition constitutes duress or overreaching by the court (Transcript 24-25); and whether the forgoing jointly or individually constitute fraud, collusion or deceit or duress and/or over-reaching sufficient to invalidate a contract is a triable issue of fact for a jury to decide. The failure of the lower court to find the adequacy of the record in support of a fact pattern of fraud and collusion regarding whether the respondents falsely induced and/or falsely represented to the appellant and/or the Surrogate an agreement with appellant's attorney and/or other 'unspecified' parties withdrawing the appellant's application to revoke the public administrator turns an issue of fact into a reviewable question of law for the Court of Appeals.

Record Impeaches Issue on Agreement—
Open Court or Otherwise

The respondents were effectively impeached on the record on the position that there was an agreement with the appellant's attorney. On summary judgment motion respondent Robert Adler claimed, "During a conference, Hawkins and I reached an agreement whereby the Public Administrator would not oppose Harley's petition and allow Harley to submit his claim on the merits and abide by any decision by the Court. In return, Harley would withdraw his petition seeking the revocation. Annexed

Exhibit H is a copy of Hawkins letter [dated December 5, 1994] setting forth terms of the agreement."[2] The relevant sections of that letter are as follows:

Valerie Hawkins

> *This letter will confirm the agreement reached by Mr. Adler, as representative for the Public Administrator in this action and the undersigned [Valerie Hawkins] as representative for Clarence J. Harley, that the Public Administrator will not oppose the verified petition of Mr. Harley, to validate his claim against the Estate of Russell Smith on condition that Mr. Harley withdraws his petition seeking the revocation of the letters of administration issued to the Public Administrator."* (Exhibit D Respondent's position statement dated November 20, 1997—reference attachment Valerie Hawkins letter)[3]

The complaint had already established that the appellant's attorney did not have authority to settle the action by letter dated December 2, 1994 [App 35a-36a]; accordingly, Hawkins affirmatively violated the appellant's instructions when she issued her December 5, 1994 [App 45a] letter to the respondents. An attorney may not settle or compromise his client's case in absence of consent by client (*Silver v Parkdale Bake Shop, Inc. 8 AD2d 607, 184 N.Y.S.2d 714*). In opposition to summary judgment the appellant submitted Hawkins' letter dated December 5, 1997 where she

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[2] ¶ 17 Affidavit in Support of Defendants' Motion for Summary Judgment.

[3] Note that the Appellant was not carbon copied on the letter.

refutes respondent's position declaring, ". . . the agreement of the parties was never filed with the court or otherwise formalized . . ." [App 38a-39a]. Accordingly, there was no valid agreement between the attorneys. The respondents were further impeached during a grievance action commenced by the appellant 2 1/2 years later. There the respondent indicated that he entered into a stipulation of counsel with Valerie Hawkins to dispose of the appellant's petition (Exhibit E, item #25, pg 5). Requirements of CPLR 2104 were not met. The appellant is only in possession of his attorney's December 5, 1994 letter and the respondents December 12, 1994 letter by dint [*sic*] of discovery efforts through the Grievance Committee prior to the commencement of the instant complaint on appeal. Noteworthy, is the fact that the Grievance Committee never compelled the respondents to reconcile the egregious misrepresentation that were affirmatively disputed during those proceedings.

The lower court, however, jumped the track on the issue of an agreement between the two attorneys. The lower court determined that the *appellant* entered into an "open court" agreement with the respondents. Incredibly a position never promoted by the respondents. The lower court's finding that ". . . negotiations produced a stipulation in open court followed by an order signed by Surrogate Bloom whereby Adler agreed to withdraw his objections to the fees requested and allow them to be submitted and decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment . . ." is directly contradicted by record since the respondent recited the following into the record:

Robert Adler

> *"The parties have agreed as follows: That Mr. Harley's claim will be determined on its merits based upon papers filed before this Court. Mr. Harley will receive a reasonable time to submit whatever documents, whatever items he needs to support his claim. The Public Administrator has agreed to file no objections to the application of Mr. Harley in consideration of him withdrawing a proceeding to remove the Public Administrator."* (Annexed Transcript, pgs 4-5)

The Public Administrator's appointment and his objections were at issue—not the respondents' objections and/or appointment.

Moreover, the record is devoid of any colloquy directed by the court with the appellant as to whether he agreed with respondents statements entered into the court record.

The facts and evidence presented out weigh [*sic*] any determination that there was ever a valid agreement—open court or otherwise. The fact that the Surrogate made an erroneous adjudication of an issue should not absolve the respondents of responsibility and accountability. To hold other wise [*sic*] would be to rule that where an attorney's misconduct has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of responsibility and accountability for the misconduct. However, the circumstances trigger the provisions of Judiciary Law § 487. Judiciary Law § 487 provides that an attorney who is guilty of *any* (emphasis added) deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition

to the punishment prescribed therefore by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action.

The failure of the lower court to find the adequacy of the record in support of a fact pattern of fraud and collusion regarding whether the respondents falsely induced and/or falsely represented to the appellant and/or the Surrogate of an agreement withdrawing the appellant's application turns an issue of fact into a reviewable question of law for the Court of Appeals.

Decision Lacks Fidility [*sic*] to Record on Appeal

Finally, the above discussion about whose appointment was being revoked and whose objections were being withdrawn and/or with whom raises a serious question as to the decisions fidelity to the record on appeal. The appellant finds a series of determinations raised in the decision that need close scrutiny by the Court. Therefore, the appellant lists the following facially flawed determinations extracted from the decision which are not reflected in the record on appeal:

> (1) ". . . Adler agreed to withdraw his objections to the fees requested and allow them to be submitted and decided by the court and in return Harley would withdraw his petition objecting to Adler's appointment." [App 8a-9a]
>
> (2) "This lawsuit . . . alleges essentially that Adler committed fraud and deceit due to his prior discussions with Russell S. Smith which enabled Smith to fraudulently encumber Estate property." [App 9a]

(3) "... the Surrogate decision awarding Plaintiff his fee makes no mention of the allegations brought here, such allegations were fully raised in open court prior to the final order." [App 10a]

(4) "... record reflects that Adler notified the court of a stipulation reached concerning action about his alleged improprieties which was recited in open court in great detail." [App 10a]

(5) Plaintiff never objected to the stipulation and failed to join [Joseph] Smith who made similar accusations against Adler ..." [App 10a]

The transcript of the hearing being the key source, submitted here on motion, contradicts items (1) and (5) above referenced at pages 4-6; and 8-10 and 24, respectively of the Annexed Transcript. The transcript is devoid of items (3) and (4) since there was never a court session where the Surrogate considered the issue of whether the respondents falsely induced and/or falsely represented to the appellant an agreement was entered into withdrawing the petition to revoke the public administrator and; while the "alleged improprieties" is a nebulous term shrouded in mystery, the transcript does not reflect any "stipulation reached concerning" respondent Robert Adler's discourse regarding the genesis of his prior representation of Russell S. Smith. Finally, item (2) above is facially false since the complaint on appeal is about the respondents false inducement and/or false representation to the appellant and/or the Surrogate that an agreement was entered into with appellant's attorney and/or other 'unspecified parties withdrawing the appellant's application to revoke the public administrator, thereby, causing the Surrogate to issue an erroneous order.

Appellant Deprived of Consideration Entitled

Res Judicata in its second aspect comes into play in situations involving a second suit, not necessarily between the same parties, which is based on a different cause of action. Alternatively labeled collateral estoppel or claim preclusion it is conclusive as to issues in the second action as were actually litigated and determined in the first action. However before collateral estoppel is evoked it must be shown that the party against whom collateral estoppel is sought had been afforded a full and fair opportunity to contest the decision said to be determinative. The appellant alleged that the participating attorneys barred him from responding to a court extension, communicated false declarations to the court about the value of the estate and extent of services provided by the appellant which caused the Surrogate to adjudicate an erroneous decision on fees earned and reimbursements due the appellant. In opposition to summary judgment, the appellant alleged that any judgment or order referring to a "stipulation of the parties" was tainted with fraud of which denied the appellant a full and fair opportunity to defend his claim. New York has adopted the full and fair opportunity test in applying the doctrine of collateral estoppel. Factors which should enter into the determination whether party has had a full and fair opportunity to litigate his/her claim include extent of litigation, availability of new evidence, competence and experience of counsel, etc., etc. (*Schwartz v Public Administrator of Co. of Bronx 24 N.Y.2d 65, 298 N.Y.S.2d 955*).

The lower court failed to apply the full and fair opportunity test entitled to consideration by the appellant opposing summary judgment motion.

Consequently, the failure of the lower court to afford the appellant consideration entitled poses a question of law reviewable by the Court of Appeals. Accordingly, the appellant presents a list of factors, not to be deemed complete, to be considered on the issue reflective in the record:

> Whether Valerie Hawkins' failure to appear at the hearing January 18, 1995, coupled with her December 5, 1994 letter [App 45a] aided the respondents inducement and/or impression upon the appellant that his petition had been withdrawn barred the appellant from having a full and fair opportunity to litigate his rights and claims and,
>
> Whether the respondents' false representation about an agreement deceived the Surrogate barred the appellant from having a full and fair opportunity to litigate his rights and claim; and
>
> Whether Valerie Hawkins countermanding the appellant's instructions vis-à-vis her December 5, 1997 letter [App 38a-39a] claiming that her agreement with the respondents was never filed with the court or otherwise formalized and that she was not able to assist the appellant on an agreement she authored barred the appellant from having a full and fair opportunity to litigate his right [*sic*] and claims; and,
>
> Whether the forgoing circumstances individually or jointly constitute fraud, collusion and/or deceit barred the appellant from having a full and fair opportunity to litigate his rights and claims;

Whether, commingling the appellant's petition(s) within the contested accounting proceeding and without counsel, barred the appellant from having a full and fair opportunity to litigate his rights and claims; and

Whether Surrogate's err on the issue of disqualification of the respondents (Seely v Seely 129 A.D.2d 625, 514 N.Y.S.2d 110) barred the appellant from having a full and fair opportunity to litigate his rights and claims; and

Whether the Surrogate was improperly briefed by the participating attorneys of the value of the estate being less [*sic*] $100,000 (Exhibit C) and/or improperly briefed regarding services rendered by the appellant barred the appellant from having a full and fair opportunity to litigate his rights and claims;

Whether the forgoing [*sic*] circumstances individually or jointly constitute fraud, deceit and/or collusion barred the appellant from having a full and fair opportunity to litigate his rights and claims.

New evidence submitted on the record and on appeal refutes material declarations communicated in the decision to the validate appellant's fees and reimbursements (Exhibit E). Excerpts from NYS Estate tax return (TT-385) reflects that at the date of death the gross value of estate, comprising real property, cash and cash equivalents, was upward of $115,000; notwithstanding the administrator liquidated the estate for more than $135,000 despite the fact that real property potentially valued at $400,000 was

not liquidated by the public administrator; while copies of tax returns, tax discharge and release of lien substantiating appellant's affidavit of services submitted to the court along with appellant's SCPA § 719(10) notification and another affidavit of services submitted through his attorney contradicts the determinations used to buttress the Surrogate [*sic*] decision to validate fees and reimbursement. Whether the discrepancies were intentional or constituted a scheme by the participating attorneys to defraud the appellant should be submitted to a jury trial where all facts could be developed. The appellant is of the opinion that the court's decision would have been different if the respondents had not made false representations about an agreement/stipulation and/or undervalued the estate, made unverified and sham objections about appellant's services causing the Surrogate to issue an erroneous order. The decision issued by the Surrogate regarding the appellant's fee referencing "stipulation of the parties" is tainted with fraud. The fact that the Surrogate made an erroneous adjudication of an issue should not absolve the respondents of responsibility and accountability. To hold other wise [*sic*] would be to rule that where an attorney's misconduct has caused a court to make an erroneous adjudication of an issue, the fact that the court has made that adjudication absolves the attorney of responsibility and accountability for the misconduct. That is not the rule and the doctrine of collateral estoppel does not apply. However, the circumstances trigger the provisions of Judiciary Law § 487. Judiciary Law § 487 provides that an attorney who is guilty of *any* (emphasis added) deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party . . . is guilty of a misdemeanor, and in addition to the punishment prescribed therefore by the penal law, he forfeits to

the party injured treble damages, to be recovered in a civil action.

Moreover, the issue as to whether the fees awarded the appellant was fair and adequate is not the same issue as whether the fees were fair and adequate in light of the fraud, collusion and/or deceit engaged in by the participating attorneys. The fact that the appellant received a fee does not mean necessarily that the fee was fair or equitable or that the appellant's attorney was competent or that fraud, collusion or deceit did not occur or that the appellant would have received a more favorable fee had the appellant's attorney been more competent or that fraud, collusion and/or deceit had not been engaged in by the participating attorneys.

Accordingly, the application of res judicata in its second aspect was improperly applied in this case on appeal.

The 2nd Department past on factors raised on appeal triggering the provision of Judiciary Law § 487.

NEW YORK SUPREME COURT
APPELLATE DIVISION: SECOND DEPARTMENT

Appellate Division Docket No. 2003-02005

CLARENCE HARLEY,

Plaintiff-Appellant,

—against—

ROBERT ADLER, Individually and as a Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER,

Defendant[sic]-Respondents.

ORDER WITH NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of the Decision and Order of the Appellate Division, Second Department, duly entered in the office of the Clerk May 10, 2004.

Dated: New York
June 8, 2004

/s/ CLARENCE HARLEY
Clarence Harley
Plaintiff-Appellant
424 Park Ave South #111
New York, NY 10016
(212) 479-7375

To: McManus, Collura & Richter, PC
Attorney for the Defendant-Respondents
48 Wall Street – 25th Floor
New York, NY 10005
(212) 425-3100

Pages 33a to 34a have been intentionally left blank

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EXHIBIT B

Letter dated December 2, 1994

[LETTERHEAD]

CLARENCE J. HARLEY
Public Accountant

December 2, 1994

Valarie [*sic*] A Hawkins, Esq.
172 Fulton Avenue
Suite 306
Hempstead, NY 11550

Re: Estate of Russell Smith
PA File # 20214
Court File # 3219/85

Dear Ms. Hawkins:

Once again I have sat and observed Robert Adler denigrate my professionalism as well as impugn my character as a way of deflecting his improprieties. He has been remiss in his duties in that he has not, after having knowledge of for over a year, secured the Quogue property from the Suffolk County redemption unit by paying the current taxes due. There also seems to be an issue with respect to the value of the property. This property was earlier appraised at $40,000 at the date of death. It seems inconceivable that the property would not have been appreciated in value over the last 10 years, especially given the location of the property. In addition, Robert Adler made no

mention of attempts to the recover the $10,000 certificate of deposit held by the Greater New York Bank for Savings, to further show the disdain that this gentleman has held for this case. This note in and of itself would have accrued to a substantial amount over the years.

The above matters are disclosed in Joseph Smith's accounting in which Robert Adler evidently does not care to utilize since it does not coincide with his views and precepts of how this estate should be managed. I cannot see myself getting any reasonable compensation for my services with Robert Adler at the helm of this estate. Especially on the heels of some weak promise that does not remotely suggest that I will be compensated. It is just not a quid pro quo situation. I stand a better chance with some other unbiased representative in place.

Ms. Hawkins, I have been involved in this matter for over six years, another six months will not make much difference at this point. I have considered the matter; and I stand fast on my petition proceedings and will not withdraw any part thereof.

Respectfully yours,

/s/ CLARENCE J. HARLEY
Clarence J. Harley

• 98 Fort Greene Place, Brooklyn, New York 11217 •
(718) 852-0707 •

[LETTERHEAD] VALERIE A. HAWKINS, ESQ.
175 FULTON AVENUE, SUITE 306
HEMPSTEAD, NEW YORK 11550
Tel. (516) 292-0984
Fax (516) 292-0987

January 17, 1995

VIA FAXIMILIE [*sic*]

Robert Adler, Esq.
Hesterberg & Keller
32 Court Street
Brooklyn, New York 11201

Re: Estate of Russell Smith
King's [*sic*] County Surrogate's
Court File No. 3219/85

Dear Mr. Adler:

This letter will serve to confirm our conversation earlier today in which I informed you that I will not be able to appear at the trial of the above referenced proceeding tomorrow because I will be actually engaged in a criminal proceeding before the District Court, Nassau County.

This letter will further confirm that I have not been able to respond to your letter dated December 2, 1994, because I have not been in contact with Clarence Harley since said date; my calls and correspondence to him have not been answered.

Sincerely,

/s/ VALERIE A. HAWKINS, ESQ.
VALERIE A. HAWKINS, ESQ.

VAH:ms
cc: Mr. Clarence Harley
Bryan Gordon, Esq.

[LETTERHEAD] VALERIE A. HAWKINS, ESQ.
175 FULTON AVENUE, SUITE 306
HEMPSTEAD, NEW YORK 11550
Tel. (516) 292-0984
Fax (516) 292-0987

December 5, 1997

Via Facsimile

Mr. Clarence J. Harley
5 Beekman Street, Suite 606
New York, New York 10038

Dear Mr. Harley:

I am in receipt of your correspondence forwarded to this office via facsimile on December 2, 1997. Quite frankly, you do need to say more to substantiate your suggestion of malpractice and a legitimate grievance.

My records reflect that I appeared with you on November 30, 1994 in the Kings County Surrogates' Court for a conference. The December 5, 1994 letter that I wrote to Mr. Adler confirms the agreement reached by the parties at said conference; namely, that Mr. Adler's office would not oppose your petition for accounting fees and you would withdraw your petition to have Mr. Adler's office removed as the fiduciary for the Estate of Russell Smith. This does not amount to malpractice. The agreement was not harmful to your interests.

You had every right to change your mind about the agreement since the agreement of the parties was never filed with the court or otherwise formalized. However, this office was not able to act on your behalf with respect to this agreement or any other matter.

This office stopped representing you in January 1995 because: You repeatedly tendered bad checks to this office;

you failed and refused to pay any portion of the modest fee that this office charged you for its services in this matter; and you failed and refused to respond to our correspondence to you. We received absolutely no correspondence from you from December 1994 until November 1997. Thus, it became your sole responsibility to protect your interest with respect to the aforementioned agreement and any other matter in the Estate of Russell Smith.

Sincerely,

/s/ VALERIE A. HAWKINS, ESQ.
VALERIE A. HAWKINS, ESQ.

VAH:lbw

EXHIBIT C

Decision of Surrogate's Court
of the
State of New York County of Kings

FILE NO. 3219-85

In the Matter of the Application of
CLARENCE J. HARLEY, Petitioner,
for a decree revoking the Letters of Administration
of SAMMUEL PLOTKIN, Public Administrator,
Pursuant to SCPA § 712,
THE ESTATE OF RUSSELL SMITH,

Deceased.

B L O O M, S.

DECISION

Pursuant to the stipulation of the parties, the application to revoke letters is dismissed.

This decision constitutes the order of the court.

/s/ BERNARD M. BLOOM
BERNARD M. BLOOM
S U R R O G A T E

Dated. Brooklyn, New York
November 2nd, 1995.

EXHIBIT D

Letter dated November 20, 1997 with enclosures

[LETTERHEAD] HESTERBERG & KELLER
Counsellors at Law
32 Court Street
Brooklyn, New York 11201-4404

(718) 875-7450

ALEXANDER G. HESTERBERG (1911-1981)
DAVID KELLER (1927-1990)
ROBERT ADLER*
JONATHAN L. MATE*Δ
GREGORY X. HESTERBERG

* NEW YORK AND NEW JERSEY BARS
Δ FLORIDA BAR

170 OLD COUNTRY ROAD*
MINEOLA, NEW YORK 11501
(516) 222-0002

252 KINDERKAMACK ROAD
ORADELL, NEW JERSEY 07649
(201) 592-0269

3301 SOUTH OCEAN BOULEVARD*
BOCA RATON, FLORIDA 33487

* BY APPOINTMENT ONLY

November 20, 1997

BY HAND DELIVERY

State of New York
Grievance Committee for the Second and
Eleventh Judicial Districts
Municipal Building – 12th floor
210 Joralemon Street
Brooklyn, New York 11201
Attn: Mark F. DeWan, Esq.

Re: Complaint of Clarence Harley
Docket No. K-2099-96

Dear Mr. DeWan:

I have your letter of November 13, 1997.

In response thereto, I am enclosing a letter dated December 5, 1996 signed by Valerie A. Hawkins, Esq., wherein she memorialized the agreement reached in Surrogate's Court, Kings County, on November 30, 1994 held before a Court Attorney/Referee that, in consideration of the Public Administrator not opposing Mr. Harley's request for fees, he would withdraw his Petition seeking the revocation of Letters of Administration issued to the Public Administrator.

It is my recollection that there was never any question but that the Court would not grant the relief requested by Mr. Harley insofar as he wanted the Public Administrator to be removed as Administrator. The Public Administrator's Accounting was before the Court and the Court simply wanted to resolve all of the Objections filed to the three Accountings, namely, the Accountings filed by the

Public Administrator, Joseph Smith and Russell Smith. Further, it wanted to resolve the issue of Mr. Harley's claim for services.

Removing the Public Administrator for the purpose of having another administrator appointed, which would require another accounting in another proceeding which would only delay the ultimate decisions of the Court, was not something the Court was willing to consider.

I have searched the Court record and the records of the Public Administrator and cannot find any letter of mine to Ms. Hawkins dated December 2, 1994. However, I am enclosing a copy of my letter to her dated December 12, 1994. Perhaps she was referring to this letter and it was merely a typographical error contained in her January 19, 1995 Letter.

In any event, throughout the negotiations to resolve all of the contested issues, there was never any time subsequent to December 1994 wherein the issue raised in Mr. Harley's Petition to remove the Public Administrator was ever discussed. It was also, in my opinion, understood that this proceeding was withdrawn upon condition that the Public Administrator would not object to Mr. Harley's application for fees.

A review of the entire Court record and the records of the Public Administrator shows that the Public Administrator fulfilled its obligation and did not file any opposition to the claim filed by Mr. Harley for fees and simply agreed to abide by any Court decision.

As previously indicated to you, the estate was sufficiently solvent to pay any fee awarded Mr. Harley, even if the Court determined that his fee should be paid in full. Therefore, I cannot understand what the basis of Mr.

Harley's objections are regarding my firm and, more particularly, my actions with regard to his claim. The actions I took and the actions of my firm in no way prevented Mr. Harley from receiving any fee that the Court would award.

I am enclosing, once again for your records, copies of two decisions of the Court dated November 2, 1995 and November 19, 1995, which, once again, refer to the "stipulation" of the parties concerning the application of Mr. Harley to remove the Public Administrator and the determination of his claim. As indicated, it is obvious that the Court too relied upon the agreement reached by Mr. Harley's attorney, my office and all other attorneys involved that the contested accounting proceedings would proceed toward a trial and Mr. Harley would be given every opportunity to establish his claim without opposition.

I hope this finally concludes this matter.

Thank you.

Very truly yours,

/s/ ROBERT ADLER
ROBERT ADLER

RA/bb

[LETTERHEAD] VALERIE A. HAWKINS, ESQ.
175 FULTON AVENUE, SUITE 306
HEMPSTEAD, NEW YORK 11550
Tel. (516) 292-0984
Fax (516) 292-0987

December 5, 1994

Robert Adler, Esq.
Hesterberg & Keller
32 Court Street
Brooklyn, New York 11201

Re: Estate of Russell Smith

Dear Mr. Adler:

As a follow-up to the conference held at the Surrogate's Court on November 30, 1994 in reference to the above captioned matter, enclosed you will find copies of the two verified petitions submitted to the Court by my client Clarence J. Harley on or about November 18, 1994.

This letter will confirm the agreement reached by Mr. Adler, as representative for the Public Administrator in this action and the undersigned as representative for Clarence J. Harley, that the Public Administrator will not oppose the verified petition of Mr. Harley, to validate his claim against the Estate of Russell Smith on condition that Mr. Harley withdraws his petition seeking the revocation of the letters of administration issued to the Public Administrator.

If you have any questions regarding Mr.Harley's position, please do not hesitate to contact the undersigned.

Sincerely,

/s/ VALERIE A. HAWKINS, ESQ.
VALERIE A. HAWKINS, ESQ.

VAH:lbw
Enclosure
cc: Bryan Gordon, Esq.

[LETTERHEAD]

[STAMPED ABOVE SEAL: OFFICE COPY]

HESTERBERG & KELLER
COUNSEL
32 COURT ST., BROOKLYN, N.Y. 11201
TELEPHONE: (718) 875-7450

SAMUEL PLOTKIN
PUBLIC ADMINISTRATOR

OFFICE OF
PUBLIC ADMINISTRATOR OF KINGS COUNTY

December 12, 1994

BY FACSIMILE & REGULAR MAIL

Valerie A. Hawkins, Esq.
175 Fulton Avenue, Suite 306
Hempstead, New York 11550

Re: Estate of Russell Smith
PA File No. 20214

Dear Ms. Hawkins:

Thank you for your letter of December 5, 1994 and the enclosures contained therein.

As discussed with you on Friday, December 9, 1994, it might be best if you could confirm with the Accounting Department if either of the two Petitions have been entertained. Naturally, if they have not been entertained, you can pick up the Petition with regard to the removal of the Public Administrator and save the filing fee.

I suggest that, if both Petitions have not been entertained, you may wish to discuss with Mr. Harley if he wishes to pick up the second Petition with the understanding that his fee would be decided in the contested account-

ing proceeding now already before the Court for which there is a current trial date.

If both Petitions have been entertained, then I will expect that you will formally, in writing, withdraw the Petitioner to remove the Public Administrator.

With regard to the second Petition, if it is entertained, this will confirm that I will simply submit an affidavit to the Court on behalf of the Public Administrator advising them that we have no objection to Mr. Harley's claim being determined pursuant to his affidavit of services to be submitted.

I will await your further advice with regard to whether the Petitions have been entertained. If I can be of any further help, please contact me.

Very truly yours,

HESTERBERG & KELLER

By: /s/ _____
Robert Adler

RA/bb

PLEASE ADDRESS REPLY TO
HESTERBERG & KELLER, 32 COURT ST.,
BROOKLYN, NEW YORK 11201-4404

EXHIBIT E

Letter dated September 4, 1997

[LETTERHEAD]

HESTERBERG & KELLER
COUNSELLORS AT LAW
32 COURT STREET
BROOKLYN, NEW YORK 11201-4404
(718) 875-7450

ALEXANDER G. HESTERBERG (1911-1981)
DAVID KELLER (1927-1990)
ROBERT ADLER*
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(201) 592-0269

3301 SOUTH OCEAN BOULEVARD*
BOCA RATON, FLORIDA 33487

* BY APPOINTMENT ONLY

September 4, 1997

State of New York
Grievance Committee for the Second and
Eleventh Judicial Districts
Municipal Building – 12th floor
210 Joralemon Street
Brooklyn, New York 11201
Attn: Mark F. DeWan, Esq.

Re: Complaint of Clarence Harley
Docket No. K-1213-97

Dear Mr. DeWan:

I received your August 28, 1997 letter on Friday, August 29, 1997.

I have reviewed the complaint of Clarence Harley and the documents sent to me submitted in support thereof and, to the best of my ability, I discern three issues which are raised by Mr. Harley in his letter of June 20, 1997, namely:

1. I represented Russell S. Smith in a matter pending in Surrogate's Court, Kings County, in the Estate of Russell Smith (uncle of Russell S. Smith) prior to my firm representing the Public Administrator of Kings County as Administrator d.b.n. of that same estate, which representation somehow created a conflict of interest which prejudiced the complainant.

2. My firm and I "obscured the frauds of Russell S. Smith and paid the personal creditors of Russell S. Smith as priority creditors of the estate. . . ."

3. I, among other persons, defrauded his office of its fees and disbursements.

I will address each of these issues separately, but I think a chronological summary of the events in this estate will be helpful to the Committee.

1. Russell Smith dies intestate on May 24, 1984.

2. A proceeding is brought by Joseph Smith and Russell S. Smith for co-Letters of Administration, which results in their appointment as co-fiduciaries.

3. Joseph Smith is sent to prison, so Russell S. Smith continues to act as fiduciary.

4. Russell Smith's estate's major asset is a parcel of real property located at 524 Decatur Street, which Russell S. Smith encumbers with two mortgages to prevent the property from being lost for taxes and other liens. The mortgages are held by individual lenders at extraordinarily high interest rates (16%).

5. Joseph Smith is released from prison and, in 1989, hires Carlyet Marshburn, Esq. to represent him in bringing a proceeding in Surrogate's Court, Kings County, to remove his brother as co-fiduciary.

6. In November 1989, Russell S. Smith comes to my firm's office to discuss his uncle's estate and I interview him.

7. I called the Judge's secretary and arranged to get a conference scheduled before said secretary for December 12, 1989.

8. On November 9, 1989, I apparently met Joseph Smith's attorney, Carlyet Marshburn, and advised him as to the status of the case.

9. On November 10, 1989, I wrote a letter to Mr. Marshburn confirming our meeting and the December 12, 1989 conference date.

10. On November 13, 1989, Mr. Marshburn advises me that his client has withdrawn the proceeding seeking to remove Russell S. Smith as fiduciary.

11. I then advised Russell S. Smith that the matter has been withdrawn and there was no need for my firm to represent him.

12. I never asked for or received a retainer agreement or fee from Russell S. Smith.

13. In 1993, proceedings are brought by Joseph Smith, by his new attorney, Dennis Gayle, to remove Russell S. Smith as co-Administrator which results in a conference on August 4, 1993 before Law Assistant Joseph Hughes.

14. Mr. Hughes calls my office and asks if an attorney can go to Court to meet with the clients and attorneys before him, namely, Joseph Smith, Russell S. Smith, Mr. Gayle, Ms. Seidman, Mr. Borchert, Mr. Alleva and Clarence Harley, public accountant. Mr. Alleva represents Russell S. Smith. Mr. Gayle represents Joseph Smith. Mr. Borchert represents a title company who may be liable to one or more of the mortgagees on the decedent's property at 524 Decatur Street. Ms. Seidman represents a mortgagee, and Mr. Harley represents himself. I was available and I went to Court.

With all present, Mr. Hughes explains the problem to me and indicates that he has suggested to the parties that each of the fiduciaries be removed and the Public Administrator

of Kings County be appointed Administrator d.b.n. to try to salvage the estate.

At that meeting, before the Court has rendered its decision and in front of the co-fiduciaries, their attorneys, Mr. Harley and counsel for a lender and title company, Mr. Helmut Borchert tells me that I have seen Mr. Russell S. Smith before. I tell him he is mistaken and I do not recall any events which may have taken place nearly four years earlier. He explains my previous involvement in front of all of the parties and I tell him I have no recollection of the case, but acknowledge I must have met Mr. Smith because I am shown copies of letters on my firm's letterhead which were apparently signed by me.

At no time, thereafter, at that meeting did anyone object to the appointment of the Public Administrator or Hesterberg & Keller as its counsel.

15. The Court rendered its decision and a Decree was prepared on notice to all parties which Decree was signed without opposition. This was done even though the parties had full knowledge of all of the facts of my apparent meeting with Russell S. Smith previously in 1989.

16. The co-fiduciaries filed accountings, each which were objected to by the Public Administrator, which accountings include a claim by the complainant, Clarence Harley, for $15,000.00 for accounting services allegedly rendered. Copies of those Accountings are enclosed.

17. I prepared, on behalf of the Public Administrator, Objections to each of the Accountings. Copies of the Objections filed by the Public Administrator to the Accountings by Russell S. Smith and Joseph Smith are enclosed.

18. Shortly after receiving my Objections to the Account of Russell S. Smith, Mr. Gayle files Objections on behalf of Joseph Smith. A copy is enclosed. Please note the similarity of the Objections, not only in substance, but in form.

I respectfully state that no fair-minded person could possibly come to the conclusion that I have somehow favored Russell S. Smith after reading the Objections I prepared for the Public Administrator opposing Russell S. Smith's Accounting.

19. Dennis Gayle, attorney for Joseph Smith, then, on March 18, 1994, sends a letter to my client, the Public Administrator of Kings County, complaining, in essence, that my firm was favoring Russell S. Smith over his client and the other heirs and asked that the Public Administrator disqualify me and my firm. Mr. Gayle, in his letter, does acknowledge he knew all of the above facts prior to the Public Administrator's appointment but did not object knowing that not only was the Public Administrator was [*sic*] to be appointed but that Hesterberg & Keller would be representing them.

20. My letter responding to Mr. Gayle's letter is attached hereto. Please note my comment regarding the timing of the letter.

21. I have also enclosed a letter from Helmut Borchert, Esq. written, without my prior knowledge, to my client to help clarify the true events of August 4, 1993.

22. The Public Administrator's file in the Estate of Joseph [*sic*] Smith was assigned to me. The major asset of the estate was the decedent's interest in 524 Decatur

Street, Brooklyn, New York. A review of the title report ordered by the Public Administrator revealed that while Russell S. Smith was acting as co-fiduciary, he encumbered it with two separate mortgages, each done in an attempt to prevent the property from being foreclosed or lost for taxes. It appears that, although Mr. Smith was represented by individual counsel, he borrowed money from "hard money lenders" and not from banks or other financial institutions. The result was that he was badly taken advantage of and the estate was saddled with two mortgages with enormous interest rates (16%). In addition, he paid extravagant mortgage broker fees. Further, the mortgage documents are simply signed "Russell Smith," leaving the mortgagees and their title company with clearing up the problem whether the co-fiduciary signed as Administrator or individually. (In reality, Russell S. Smith had, at best, only a one-quarter interest in 524 Decatur Street, and would only get financing if he encumbered the whole property. Therefore, it was likely any litigation on this point would have ultimately found the estate liable on the loans, making Russell S. Smith subject to being surcharged for his acts.)

23. The Public Administrator was afraid the property would be foreclosed leaving a large deficiency, allowing the mortgagees to go after the remaining assets of the estate.

24. I entered into negotiations with the lenders and got them to reduce their claims by approximately $20,000.00 which allowed the Public Administrator to auction the property and close title with a profit for the estate while protecting the remaining estate assets. Copies of the two

Stipulations which I prepared and were ultimately signed by all parties are enclosed.

25. Mr. Harley hires Valerie A. Hawkins, Esq. to bring a proceeding to revoke the Letters of Administration issued to the Public Administrator stating the same grounds as is lodged in his current complaint. This proceeding, pursuant to stipulation of counsel, is dismissed by the Surrogate.

26. The Public Administrator files his Accounting in which Clarence Harley's claim for $15,000.00 is rejected. Clarence Harley files Objections to the Public Administrator's Accounting and issue is joined.

27. I agreed on behalf of the Public Administrator together with all other interested parties, including Mr. Harley and his counsel, to submit Mr. Harley's claim to the Surrogate for decision without filing any papers in opposition or examining him with regard to his alleged services.

28. The Surrogate rendered his decision, a copy of which is attached, dated November 19, 1995, which fixes Mr. Harley's fee in the sum of $1,500.00 plus $170.95 in disbursements.

29. An Order is prepared, on notice, fixing Mr. Harley's fee. The Order is signed without opposition. A copy of that Order dated November 30, 1995 is enclosed.

30. Objections filed by each of the co-Administrators to the other's Accounting and the Objections filed by the Public Administrator to each of the Accountings of the former fiduciaries were settled in open Court, just prior to a trial on the issues. To settle his Objections against Russell S. Smith, Joseph Smith received Russell S. Smith's interest in the decedent's unimproved lot in Quogue, New York,

which passed to the heirs "in kind," and therefore was not part of decedent's probate estate. No fees or commissions were taken by the Public Administrator or his counsel with regard to that property, despite the fact that a Deed and other documents transferring title were prepared for recording for the heirs. A copy of the Deed transferring the decedent's interest in his unimproved land in Quogue, New York, in which Joseph Smith received Russell S. Smith's share, thereby giving him a one-half interest in the property, is enclosed.

31. On January 3, 1997, after the election and installation of a new Surrogate, Hesterberg & Keller was replaced as counsel to the Public Administrator on all matters, including the Estate of Joseph Smith.

32. New counsel, Louis R. Rosenthal, Esq., brought the Public Administrator's Accounting up-to-date and filed a final Decree concluding the estate. The Decree was signed without opposition and Mr. Harley was paid. A copy of that Decree is enclosed.

Let me now address the three individual items of complaint.

I. CONFLICT OF INTEREST

Although in 1993, I had no recollection of meeting with Mr. Russell S. Smith, it is obvious that I had intervened on his behalf in 1989 in a proceeding brought by his brother to have Mr. Smith removed as fiduciary.

What occurred on August 4, 1993 before Law Assistant Joseph Hughes was not uncommon for the Court or the Public Administrator's office. He was faced with a situa-

tion in which both co-fiduciaries should probably be removed, one apparently because he was a convicted felon, and the other because he had, among other things, mishandled the estate. In addition, the two remaining distributees took no active role and, upon information and belief, wanted no part in being appointed administrator d.b.n.

The only possible solution was to appoint the Public Administrator, which appointment I never suggested nor sought. When Mr. Hughes asked me to attend the conference, I had no knowledge of ever meeting Russell S. Smith or doing anything on his behalf. As previously stated, I had no retainer agreement with him, written or otherwise, no file, and did not seek or receive a fee.

I had no knowledge that a conference was being held on August 4, 1993 before Joseph Hughes called my office.

In any event, all of these factors were brought out to all of the parties including Mr. Harley on August 4, 1993, prior to the appointment of the Public Administrator, and no objection was raised nor any papers submitted in opposition to the order appointing the Public Administrator.

It was only after the co-fiduciaries accounted to the Public Administrator and the remaining heirs, and the Public Administrator objected to the fee of Mr. Harley did any one raise objections to Hesterberg & Keller acting as counsel to the Public Administrator in this matter.

I once again respectfully refer the Committee to (a) the Objections filed by the Public Administrator to Russell S. Smith's Accounting; and (b) the unsolicited letter sent to the Public Administrator by attorney Helmut Borchert after he received a copy of Mr. Gayle's letter of March 18, 1994.

II. HESTERBERG & KELLER OBSCURED FRAUDS OF RUSSELL S. SMITH AND GAVE PREFERENCE TO CREDITORS

A review of the facts show that the Public Administrator filed Objections to the Accounting of Russell S. Smith and charged him with negligence in handling his uncle's estate and asked the Court to personally surcharge him for more than $60,000.00.

I personally re-negotiated the mortgages placed upon the property by Russell S. Smith and saved the estate approximately $20,000.00 and protected the other estate assets from the mortgagees.

The creditors who were paid on the sale of 524 Decatur Street, Brooklyn, New York, were not preferred over other creditors of the estate or its heirs, but were the holders of mortgages and judgments or other liens on said property. They had to be paid at the closing.

In any event, the Estate of Russell Smith was solvent and all creditors, to the extent that their claims were approved by the Administrator or allowed by the Surrogate, were paid in full. Further, the Objections to the Accountings filed by the parties and the Public Administrator were resolved in open Court and agreed to by Joseph Smith and Russell S. Smith.

III. HESTERBERG & KELLER DEFRAUDED MR. HARLEY FROM HIS FEE

The claim of Mr. Harley for $15,000.00 for accounting services rendered was properly objected to by the Public Administrator. In view of the amount accounted for by the co-fiduciaries, and without substantiation, the fee appeared to be excessive and the Public Administrator had no choice but to reject the claim.

Mr. Harley never submitted anything to the Public Administrator or the Court which could possibly justify his fee.

The Surrogate, in his decision, recites that, on January 18, 1995, Mr. Harley asks the Court for additional time to justify his fee. He was given 30 days. In fact, he was given nearly 10 months to support his claim before a decision was rendered and nothing was forthcoming.

As previously indicated, no papers were submitted by the Public Administrator or my firm in opposition to any documents submitted by Mr. Harley to substantiate his claim. The Public Administrator simply allowed the Surrogate to determine the value of Mr. Harley's services.

Finally, this writer appreciates that it is Mr. Harley's right to file a complaint against anyone who he thinks may have acted improperly against him. However, a review of Mr. Harley's letter indicates that he has raised issues which in no way affected his claim against the estate and has complained of everyone who seems to have been associated with the case including the Court Attorney/Referee and his own attorney.

The reality is, Mr. Harley was treated more than fairly by the Public Administrator, his counsel and the Court, but simply could not establish his rights to the fee he sought.

I believe my letter and the enclosures more than adequately responds to Mr. Harley's complaint, but if the Committee wishes additional documentation or to speak with me directly, please feel free to contact me.

Very truly yours,

/s/ Robert Adler
ROBERT ADLER

RA/bb

APPENDIX F

DEED

12063PG092	2	3
Number of pages 5	[STAMPED] RECEIVED $ 484 REAL ESTATE AUG 15 2000 TRANSFER TAX SUFFOLK COUNTY	[STAMPED] RECORDED 2000 AUG 15 PM 12:22 EDWARD P. ROMAINE CLERK OF SUFFOLK COUNTY
TORRENS		
Serial #		
Certificate #		
Prior Ctf #	2059	
Deed/Mortgage Instrument	Deed/Mortgage Tax Stamp	Recording/Filing Stamps

4 FEES

Page/Filing Fee	15		Mortgage Amt.
Handling	5		1. Basic Tax
TP-584	5		2. Additional Tax
Notation			Sub Total
EA-52 17 (County)	5	Sub Total 30	Spec./Assit. Or Spec./Add.
EA-5217 (State)	25		
R.P.T.S.A.	15		TOT. MTG. TAX
Comm of Ed.	5.00	[ROUND SEAL] SUFFOLK COUNTY NEW YORK	Dual Town Dual County Held for Apportionment
Affidavit			Transfer Tax 484
Certified Copy			Mansion Tax
Reg. Copy		Sub Total 45	The property covered by this mortgage is or will be improved by a one or two family dwelling only. YES __ or NO __ If NO, see appropriate tax clause on page # __ of this instrument.
Other		GRAND TOTAL 75 [?]	

5	Real Property Tax Service Agency Verification				6	Community Preservation Fund
[round stamp]	Dist.	Section	Block	Lot	Consideration Amount $ 121,000	
Stamp	0902	003.00	02.00	025.000	CPF Tax Due	$ 420.-
Date [Illegible]						Improved ____
Initials /s/						Vacant Land X

[STAMPED]
RECEIVED
$ 420
AUG 15 2000
COMMUNITY PRESERVATION FUND

7 Satisfactions/Discharges/ Releases List Property Owners Mailing Address

RECORD & RETURN TO:

KEVIN J. POWERS, ESQ.
BOX 682
CENTER MORICHES, NY 11934

TD 0902
TD ____
TD ____

8	**Title Company Information**
Co. Name	Chicago Title Insurance Co.
Title #	3800-00775

9	**Suffolk County Recording & Endorsement Page**

This page forms part of the attached DEED - EXECUTOR'S made by:
(SPECIFY TYPE OF INSTRUMENT)

PUBLIC ADMINISTRATOR
OF KINGS COUNTY
TO
MALRY L. TARDD, JR.

The premises herein is situated in
SUFFOLK COUNTY, NEW YORK.
In the Township of Southampton .
In the VILLAGE
or HAMLET of Quogue

BOXES 5 THRU 9 MUST BE TYPED OR PRINTED IN BLACK INK ONLY PRIOR TO RECORDING OR FILING.

EXECUTOR'S DEED

THIS INDENTURE, made the 2nd day of August, in the year Two Thousand

BETWEEN

PUBLIC ADMINISTRATOR OF KINGS COUNTY, with offices at 2 Johnson Street, Brooklyn, New York 11201,

as administrator of the Estate of RUSSELL SMITH late of 9 Montauk Highway, Quogue, New York who died intestate on the 24th day of May, nineteen hundred and eighty-four.

party of the first part, and

Malry L. Tardd, Jr., residing at 11 Montauk Highway, P.O. Box 1210, Quogue, New York

party of the second part,

WITNESSETH, that the party of the first part, to whom Letters of Administration were issued by the Surrogate's Court, Kings County, New York, on August 5, 1993 and by virtue of the power and authority given by Article 11 of the Estates, Powers and Trusts Law, and in consideration of

ONE HUNDRED TWENTY-ONE THOUSAND ($121,000.00) dollars, paid by the party of the second part, does hereby grant and release unto the party of the second part, the distributees or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Brooklyn, County of Kings, City and State of New York bounded and described as follows:

ALL THAT CERTAIN PLOT, PIECE, OR PARCEL OF LAND, SITUATE, LYING AND BEING IN THE INCORPORATED VILLAGE OF QUOGUE, TOWN OF SOUTHAMPTON, COUNTY OF SUFFOLK AND STATE OF NEW YORK AND ACQUIRED BY TAX DEED ON MAY 12, 1992 FROM GENERAL L. RAINS, THE DEPUTY COUNTY TREASURER OF SUFFOLK COUNTY, NEW YORK AND RECORDED ON MAY 21, 1992 IN LIBER 11470 CP 239/240 AND OTHERWISE KNOWN AS AND BY INCORPORATED VILLAGE OF QUOGUE, TOWN OF SOUTHAMPTON, SCH DIST 3 N-JACKSON E-SCHUNK S-MONTAUK HWY W-PILZER.

DEED DESCRIPTION ATTACHED SCHEDULE A

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof; TOGETHER with the appurtenances, and also all the estate which the said decedent had at the time of decedent's death in said premises, and also the estate therein, which the party of the first part has or has power to convey or dispose of, whether individually, or otherwise; TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the distributees or successors and assigns of the party of the second part forever.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

IN PRESENCE OF:

/s/ MARIETTA SMALL
Public Administrator, Kings County

[Stamped Number: 12063PG092]

UNIFORM FORM CERTIFICATE
OF ACKNOWLEDGMENT
(Within New York State)

State of New York)
County of Kings) ss.:

On the 2nd day of August in the year 2000 before me, the undersigned, personally appeared Marietta Small personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies) and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

/s/ RICHARD PAUL JR.
Signature and Office of individual
taking acknowledgment

[STAMP]
RICHARD PAUL JR.
Notary Public, State of New York
No. 01PA5079439
Qualified in Kings County
Commission Expires June 2, 2001

CHICAGO TITLE INSURANCE COMPANY

Title No. 3800-00775

LEGAL DESCRIPTION

ALL THAT CERTAIN PLOT, PIECE, OR PARCEL OF LAND, SITUATE, LYING, AND BEING IN THE INCORPORATED VILLAGE OF QUOGUE, TOWN OF SOUTHAMPTON, COUNTY OF SUFFOLK AND STATE OF NEW YORK BEING BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT A MONUMENT SET IN THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80) DISTANT 293.85 FEET EASTERLY FROM THE CORNER FORMED BY THE INTERSECTION OF THE EASTERLY SIDE OF OLD MAIN ROAD (OLD QUOGUE-RIVERHEAD ROAD) WITH THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80);

RUNNING THENCE NORTH 00 DEGREES 18 MINUTES 40 SECONDS WEST ALONG LAND NOW OR FORMERLY OF NEW YORK STATE 260.40 FEET TO A MONUMENT AND LAND NOW OR FORMERLY BERTHA ARCH JACKSON;

THENCE NORTH 86 DEGREES 15 MINUTES 20 SECONDS EAST ALONG LAST MENTIONED LANDS 75.26 FEET TO LAND NOW OR FORMERLY OF MALRY TARDD, JR.;

THENCE SOUTH 05 DEGREES 14 MINUTES 10 SECONDS EAST ALONG LAST MENTIONED LAND 265.89 FEET TO THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80);

THENCE SOUTH 89 DEGREES 41 MINUTES 20 SECONDS WEST ALONG THE NORTHERLY SIDE OF MONTAUK HIGHWAY (S.R. 27A-C.R. 80) 97.95 FEET TO A MONUMENT SET AT THE POINT OR PLACE OF BEGINNING.

FOR INFORMATION ONLY: DISTRICT 0902 SECTION 003.00 BLOCK 02.00 LOT 025.00

LEGAL —LEGAL DESCRIPTION—

STATE OF NEW YORK, COUNTY OF _____
[ILLEGIBLE].
On the __ day of _____ 2000, before me personally came _____
to me known, who, being by me duly sworn, did depose and say that he resides at No. _____
_____
that he is the _____
of _____
_____, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed [?] _____ name thereto by like order.

STATE OF NEW YORK, COUNTY OF KINGS.
On the __ day of _____ 2000, before me personally came JOEL GARZMAN
Deputy Public Administrator of Kings County, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

_____
_____
_____

STATE OF NEW YORK, COUNTY OF _____
On the __ day of _____ 2000, before me personally came _____

the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that he resides at No. _____ _____ that he knows _____ _____ to be the individual described in and who executed the foregoing instrument; that he, said subscribing witness, was present and saw _____ execute the same; and that he, said witness, at the same time subscribed [?] _____ same as witness thereto.

CHICAGO TITLE INSURANCE CO.
PUBLIC ADMINISTRATOR'S DEED

TITLE NO. 3800-00775

Public Administrator of Kings County,
as Administrator _____ of the Estate of

RUSSELL SMITH

Deceased

TO

MALRY TARDD, JR.

SECTION	3
BLOCK	2
LOT	25
COUNTY OR TOWN	
STREET ADDRESS	9 Montauk Highway Quogue, New York

STANDARD FORM OF NEW YORK BOARD
OF TITLE UNDERWRITERS
Distributed by
THE TITLE GUARANTEE COMPANY

Recorded As Request of The Title Guarantee Company
RETURN BY MAIL TO:

Kevin J. Powers
Attorney At Law
Seven Sonic Avenue, Box 862
Center Moriches, NY 11934

[Illegible]

APPENDIX G

Letter dated October 18, 2002

[LETTERHEAD]

A. GAIL PRUDENTI
Presiding Justice

(631) 852-3858
Fax (631) 852-1456

Appellate Division
Supreme Court of the State of New York
Second Judicial Department
210 Center Drive
Riverhead, New York 11901

October 18, 2002

Mr. Clarence Harley
424 Park Avenue South 111
New York, New York 10016

Dear Mr. Harley:

I am Presiding Justice A. Gail Prudenti's principal law clerk. Justice Prudenti asked me to review your present and past correspondence, including all the material you submitted, as well as the responses you received from Ms. Hannon.

First of all, I am not sure if you are aware that Ms. Hannon forwarded your most recent correspondence, dated September 30, 2002, including the affidavit from Mr. Joseph L. Smith, to Diana M. Kearse, the Chief Counsel to the Grievance Committee for the Second and Eleventh Judicial Districts as "new or additional evidence for your

consideration" and to "take whatever action you deem appropriate."

Accordingly, the matter is being reviewed preliminarily and I suggest that you wait for the results of that review.

I would like to make the general point, however, that Ms. Hannon's numerous responses to your previous letters to the Presiding Justice are correct. That is, the authority of the Presiding Justice is not without limitations. Her authority, for example, does not provide for interfering with, overruling or even reviewing the administrative decisions of bodies established under law, such as the Grievance Committees, or acting as an appellate court of one over decisions from trial courts, such as the Surrogate's Court.

Accordingly, insofar as the Presiding Justice is concerned, it is not a question of whether or not she agrees with your conclusions or whether she is sympathetic to your concerns, she simply has no authority by the nature of her position to act on those concerns. Indeed, if she did take any action, she would be acting inappropriately.

This is not to say you are without remedies—either administratively or judicially—but writing to the Presiding Justice does not lead to such a remedy. Incidentally, with regard to your comments about the file in the Surrogate's Court, you should bring your concerns in that regard to the Chief Clerk of the Surrogate's Court or, if that does not satisfy you, to the Administrative Judge for that judicial district.

The Presiding Justice hopes you understand and appreciate the constraints of her position. If you need assistance in pursuing whatever remedies may be available to you, you should seek the advice of counsel. Unfortunately, judges and employees of the court system are not permitted to provide legal advice.

I am sorry we cannot be of any more assistance to you.

Very truly yours,

/s/ ROBERT A. MARGOLIN
ROBERT A. MARGOLIN
Principal Law Clerk to
A. Gail Prudenti,
Presiding Justice

RAM:r

cc: Diana M. Kearse, Esq.
Joan L. Hannon, Esq.

[LETTERHEAD]

(718) 875-1300

STATE OF NEW YORK
APPELLATE DIVISION, SUPREME COURT
2nd JUDICIAL DEPARTMENT
45 Monroe Place
Brooklyn, New York 11201

[Seal]
Chambers of
Presiding Justice

June 3, 2002

Mr. Clarence Harley
424 Park Avenue South 111
New York, New York 10016

Re: Robert Adler, Esq.

Dear Mr. Harley:

I am in receipt of your letters dated March 23 and April 30, 2002, to Presiding Justice A. Gail Prudenti.

Your complaint of professional misconduct against the aforementioned attorney was reviewed by the Grievance Committee for the Second and Eleventh Judicial Districts, which determined that there was no breach of the Code of Professional Responsibility. That determination was subsequently reviewed by an individual Committee member, who was unable to find any basis for reversing the original determination.

Upon reviewing the materials submitted by you, we find no reason to re-open the matter or to depart from the Grievance Committee's determination. The transcript of

the proceedings in the Surrogate's Court on January 19, 1995, reveal that the Surrogate, who was in the best position to make a determination, found that there was no conflict of interest whatsoever (p. 24). Moreover, the Public Administrator, whom Mr. Adler represented, did not oppose your claim and left it to the court to determine the value of your services (p. 42).

This court is not empowered to conduct a full-scale reinvestigation of your complaint. Other than a review of the Grievance Committee's determination by an individual Committee member and a further review by a court attorney, both of which have occurred, there is no further recourse.

This matter is now considered closed. There is nothing further that this office or the Grievance Committee can do to assist you. You are, of course, free to pursue whatever civil remedies may be available to you, subject to the applicable Statutes of Limitation.

Sincerely,

/s/ JOAN L. HANNON

JOAN L. HANNON
Principal Appellate
Court Attorney

[LETTERHEAD]

(718) 875-1300

STATE OF NEW YORK
APPELLATE DIVISION, SUPREME COURT
2nd JUDICIAL DEPARTMENT
45 Monroe Place
Brooklyn, New York 11201

[Seal]
Chambers of
Presiding Justice

August 20, 2002

Mr. Clarence Harley
424 Park Avenue South 111
New York, New York 10016

Re: Robert Adler, Esq.

Dear Mr. Harley:

I am in receipt of your letter dated July 29, 2002, to Presiding Justice A. Gail Prudenti.

As I explained to you in my previous letter, this court is not empowered to conduct a full-scale re-investigation of your complaint. Other than a review of the Grievance Committee's determination by an individual Committee member and a further review by a court attorney, both of which have occurred, there is no further recourse.

If you have additional documents that were not previously considered by the Grievance Committee, you may request that the Committee reconsider the matter in light of such additional evidence. However, absent any new or additional evidence, the matter is considered closed, and

there is nothing further that this office or the Grievance Committee can do to assist you.

You are, of course, free to pursue whatever civil remedies may be available to you, subject to the applicable Statutes of Limitation.

Sincerely,

/s/ JOAN L. HANNON
JOAN L. HANNON
Principal Appellate
Court Attorney

APPENDIX H

Letter dated Oct. 28, 2002

[LETTERHEAD]

MCMANUS, COLLURA & RICHTER, P.C.
ATTORNEYS AT LAW
FORTY-EIGHT WALL STREET
NEW YORK, NEW YORK 10005
(212) 425-3100
FAX (212) 425-3175

JOHN A. MCMANUS
ANTHONY M. COLLURA
ANNE PATRICE RICHTER*
ANN MARIE FORTE*
SUSAN M. JOHNSON
CHRISTOPHER D. SKOCZEN
BRADLEY E. DUBIN
*ALSO ADMITTED IN CONN.
*ALSO ADMITTED IN N.J.

RONALD A. BALZANO*
NICHOLAS P. CHRYSANTHEM
OF COUNSEL

October 28, 2002

Robert C. Ebeling, Esq.
The Law Offices of Richard C. Ebeling, P.C.
200 East Post Road
White Plains, New York 10602

Re: Harley v. Hesterberg & Keller, et al.
New York Supreme Court, Kings County
Index No.: 5058[illegible]/00

Dear Mr. Ebeling:

This letter follows up our recent telephone conversation wherein you confirmed that you continue to represent the plaintiff in the above captioned matter. According, we request that you advise your client that all communications must be conducted through your office. Further, please be advised that service by your client of a document entitled Supplemental Request for Production of Documents is hereby rejected by this office.

Very truly yours,

/s/ ANN MARIE FORTE
Ann Marie Forte
AMF/pm
HARLEY/Letter21

APPENDIX H-1

Excerpts of Supplemental Request
for Production of Documents

SUPREME COURT: STATE OF NEW YORK
COUNTY OF KINGS

Index: 50587/00

CLARENCE HARLEY

Plaintiff,

—against—

ROBERT ADLER, Individually and as a Partner of HESTERBERG & KELLER; JONATHAN L. MATE, GREGORY X. HESTERBERG, Individually and as Partners of HESTERBERG & KELLER; and the law firm of HESTERBERG & KELLER

Defendants.

Supplemental Request for Production of Documents

PLEASE TAKE NOTICE, that the plaintiff Clarence Harley demand that, defendants Robert Adler Individually and as a Partner of Hesterberg & Keller, Johnathan [*sic*] L. Mate, Gregory X. Hesterberg, Individually and as Partners of Hesterberg & Keller, the law firm of Hesterberg & Keller, pursuant to CPLR 3102(a) produce for inspection

and copying the following documents at the Offices of McManus, Collura & Richter, PC 20 Exchange Place New York, NY 10005 within 20 days of the date of this demand.

DEFINITIONS

1. "Document" means all written, reported, recorded or graphic matter, however produced or reproduced, including, but not limited to memoranda, reports, financial reports, notes, letters, envelopes, telegrams, messages, including reports, notes and memoranda of telephone conversations and conferences, studies, analysis, newspapers, booklets, circulars, bulletins, notices, instructions, handwritten notes, records, studies, pamphlets, voice recordings, reports, work papers, drafts, calendars, date book, surveys, charts, graphs and checks (both sides).

2. "Communication" or "Communicated" means any oral statement, dialogue, colloquy, discussion, or conversation, and also means ant [*sic*] transfer of thoughts or ideas of persons by

* * *

e) Respond to that aspect or a part of the request to which you do not have any objection.

DOCUMENTS REQUESTED

1. Copies of all documents relied, consulted, referred to in formulating your response to Plaintiff's Combined Demands.

2. Copies of all documents referred to in Robert Adler's position papers dated September 4, 1997 and November 20, 1997 to the Grievance Committee (Exhibit J and K of Verified Complaint)

3. Copies of two stipulation signed by parties referred to in point #24 of Robert Adler's position paper to the Grievance Committee dated September 4, 1997 (Exhibit J of Verified Complaint)

4. Copies of all documents and communications related to the Michael Mazza payment of $29,696.00 on 2/2/94 (copy of canceled check, money order etc [*sic*]), including invoice and/or claim filed with the Public Administrator and/or Surrogate.

5. Copies of all documents and communications between Adler and Gary Mund related to the Estate Proceeding.

6. Copies of all documents and communications between n [*sic*] Adler and Gary Mund related to the plaintiff's applications filed in the Surrogate's Court, Kings County.

7. Copy of "stipulation of counsel" as referred to in point #25 of Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

8. Copies of all documents relied upon to form opinion referred to in point #22 of Robert Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

9. Copies of all documents and communications related to the Beth Sussman payment of $42,827.96 on 2/2/94 (copy of canceled check, money order etc[*sic*]), including

invoice and/or claim filed with the Public Administrator and/or Surrogate Court.

10. Copies of objections filed by plaintiff to the Administrator's Accounting as referred to in point #26 of Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

11. Copies of documents relied upon to form opinion referred to in point #23 of Robert Adler's position papers dated September 4, 1997 (Exhibit J of Verified Complaint).

12. Copy of formal writing withdrawing the plaintiff's Petition to remove the Public Administrator as referred to in Adler's letter dated December 12, 1994, to Valerie Hawkins. (Exhibit K of Verified Complaint or alternatively part to Adler's position paper dated November 20, 1997).

13. Copies of all appraisals on property in the Estate Proceeding.

14. Copies of all documents and communications related to appraisals on all property in the Estate Proceeding.

15. Copies of all Stipulations signed by Joseph L. Smith in the Estate Proceeding.

16. Copies of all Stipulations signed by Harold Smith in the Estate Proceeding.

17. Copies of all documents and communications related to the payment to NYC Dept of Finance on 2/8/95 for $7,182.69; including method of payment (copy of canceled check, money order etc [*sic*]), invoice or contract supporting payment.

18. Copies of all documents and communications related to the payment to American Title Co on 3/13/95 for $2000.00 including method of payment (copy of canceled check, money order etc[*sic*]), invoice or contract supporting disbursement; including alleged stipulation related to disbursement.

19. Copies of all documents and communications related to the agreement/contract with J.A.L. Management for managing property at 632 Decatur Street.

20. Copies of all documents and communications related to East New York Savings Bank settlement of action for wrongful payment of A/C #1-5035791-2.

21. Copies of all documents and communications filed by Beth Sussman and/or representative of Beth Sussman related to claim in the Estate Proceeding.

22. Copies of all claims filed by Michael Mazza and/or representative of Michael Mazza related to claim in the Estate Proceeding.

23. Copies of all Stipulations signed by the plaintiff.

24. Copies of all documents and communications related to the Sale of estate property in Brookhaven New York for $25,000.00 on January 4, 1994.

PLEASE TAKE FURTHER NOTICE, that the forgoing [*sic*] demand is a continuing demand and in the event the materials become available after designated date, they should be forwarded to the plaintiff within twenty (20) days of receipt. In the event that said materials are not produced for inspection and/or photocopying as required herein the undersigned will move this Court to invoke the penalties applicable under Article 31 of the CPLR.

September 25, 2002

/s/ CLARENCE HARLEY

CLARENCE HARLEY
424 Park Avenue South #111
New York, NY 10016
(212) 479-7375

ANN MARIE FORTE
McManus, Collura & Richter, PC
48 Wall Street
New York, NY 10005
(212) 425-3100